

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARGARET J. LOEWEN, M.D.,

Plaintiff,

v.

File No. 1:10-CV-1284

GRAND RAPIDS MEDICAL EDUCATIONAL
PARTNERS, a corporation;
SPECTRUM HEALTH SYSTEM, a
corporation; TRINITY HEALTH
CORPORATION, a corporation t/d/b/a
SAINT MARY'S HEALTH CARE;
MICHIGAN STATE UNIVERSITY, a
corporation; MARC SCHLATTER, an
individual; and JOHN vanSCHAGEN,
an individual,

Defendants.

/

Oral Argument re: Defendant Michigan State University's
Motion to Dismiss or for Summary Judgment
and Defendants Trinity Health Corporation and
Spectrum Health System's Joint Motion to Dismiss
and for Summary Judgment

Before

THE HONORABLE GORDON J. QUIST
United States District Judge
May 18, 2011

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

APPEARANCES

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PROCEDURE

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8 THE COURT: Good morning. Please be seated.

9 I was just told when the door opened back there that
10 somebody filed something 86 pages long yesterday which I found
11 out about for the first time. What's all that about? Was it
12 the plaintiff that filed it?

13 MR. LIEBER: Your Honor, James Lieber for the
14 plaintiff. Yes, we filed the complete handbook for residents,
15 parts of which have been filed in the past.

16 THE COURT: Okay. All right. We're here on the
17 case of Margaret Loewen, M.D., against Grand Rapids Medical
18 Education Partners and others, case number 1:10-CV-1284. Can
19 I have the appearance of counsel, please?

20 MR. LIEBER: James Lieber for the plaintiff,
21 Margaret Loewen, who's here today.

22 THE COURT: Thank you.

23 MR. DREW: Stephen Drew on behalf of the plaintiff,
24 Your Honor.

25 MS. LACHMAN: Sara Lachman here on behalf of

1 Spectrum.

2 MR. BRETZ: Daniel Bretz on behalf of Trinity Health
3 and Saint Mary's Health Care.

4 THE COURT: I'm sorry?

5 MR. BRETZ: Daniel Bretz.

6 THE COURT: All right.

7 MS. KELLEY: Theresa Kelley for Michigan State
8 University.

9 THE COURT: Okay. All right.

10 I've gone over the briefing fairly thoroughly, read
11 some of the leading cases, maybe all of them, so you don't
12 have to spend a lot of time reviewing the facts. So if you
13 make your presentation, get right to the heart of it right
14 away.

15 Okay. Let me hear from you first, then, Mr.
16 Lachman -- Ms. Lachman, I'm sorry. Sara Lachman, okay.

17 MS. LACHMAN: Certainly, Your Honor.

18 Well, I won't go into too many details. It's
19 obviously a very large complaint. There's 13 counts that have
20 been asserted against the hospitals, and we believe that there
21 are essentially five reasons that all those counts should be
22 dismissed, particularly the Title VII, ADEA, and ELCRA claims.
23 They fail because the hospitals were not plaintiff's employer.

24 The Title IX claims fail because the hospitals are
25 not educational institutions. The Title IX claims also fail

1 because the plaintiff has not alleged that the hospitals were
2 deliberately indifferent to known acts of harassment which is
3 required under Title IX.

4 All the discrimination and retaliation claims fail
5 because there's just been no allegation that the hospitals
6 took any adverse employment action against the plaintiff. And
7 lastly, the unjust enrichment claim fails because a resident
8 agreement governs the terms of her residency. Where there's
9 an express contract, an unjust enrichment claim cannot stand.

10 THE COURT: Is the unjust enrichment claim still in
11 front of this? I know it's not -- nothing's been formally
12 done about it, but I didn't notice any big objections to the
13 unjust enrichment claim going. Maybe the plaintiff can answer
14 that.

15 MS. LACHMAN: I can answer it as well, Your Honor.
16 There was a claim asserted -- the unjust enrichment claim was
17 asserted against GRMEP as well as the hospitals, and the
18 plaintiff does not -- did not contest the motion by GRMEP, and
19 so that has been dismissed by the Court I believe on Monday.
20 But the plaintiff has not -- does contest the motion to
21 dismiss as to the hospital.

22 So to just touch briefly on each of those issues,
23 the first being that the hospitals were not the plaintiff's
24 employer, the test really is not whether there's a
25 relationship between the hospitals and the residency program,

1 GRMEP's residency program. A mere relationship isn't enough.
2 The test is did the hospitals have sufficient control over the
3 terms and conditions of the plaintiff's employment, and they
4 didn't. Everything shows that.

5 Not only does the plaintiff fail to allege anything
6 more than they -- I think the language was they were
7 considered her employers in her complaint, so it's an obvious
8 failure under the pleading standards. But it doesn't help to
9 grant leave to amend because she can't prove that they were
10 employers.

11 GRMEP, under the Operating Agreement, it's GRMEP's
12 responsibility to recruit, select, pay, hire, discipline,
13 suspend, dismiss from the program the residents. The
14 hospitals don't have any control over that. The same thing is
15 reflected in the resident agreement that Dr. Loewen had with
16 GRMEP.

17 And then in reference to the I believe it was
18 88-page exhibit that was filed last night, I did have some
19 time last evening to go through it, and there isn't anything
20 else different in that. All of that is supportive as well.
21 The terms and conditions of Margaret Loewen's residency was
22 controlled by GRMEP, and there also was an affidavit by
23 GRMEP's CFO that supported it as well. GRMEP was the
24 employer. They don't deny it.

25 The plaintiff argues that sure, GRMEP was the

1 employer, but, well, then the hospitals should be considered
2 joint employers. That argument fails. The plaintiff will
3 cite things like the hospitals had people on the Board of
4 Directors, things like that, that they -- that the residency
5 program used the hospitals' facility. None of these things
6 suffice. That's not control over her terms and conditions of
7 employment.

8 And one thing we did not cite in our brief, it was a
9 case that we just located this morning, actually, but if the
10 Court would allow, I'd just like to cite a reference to it.
11 That is Moldenhauer v. Tazewell-Pekin Consolidated
12 Communication Center, et al. That case is at 536 F.3d. 640.
13 It's a Seventh Circuit case. It's recent, from 2007, and that
14 case is instructive here.

15 In that case there was a dispatcher that worked for
16 a nonprofit 911 dispatch center and a city and a county used
17 those services. They did many things. Not only did the
18 nonprofit use the city and county's facilities, but they did
19 all sorts of things, including listing themselves as employer
20 on many of her employment documents, tax returns, things like
21 that, and they certainly had people sitting on the board for
22 Taz-Com.

23 But the Seventh Circuit said that's not enough to
24 create a joint employment situation. They didn't have
25 ultimate control over the terms and conditions of her

1 employment. Particularly, they couldn't hire and fire. And
2 so what they said there is many, many government -- many
3 government officials sit on many boards, and this fact alone
4 cannot suffice to justify the extension of the joint employer
5 liability. But obviously, neither did any of the other
6 factors that were there as well because they didn't find joint
7 employment there.

8 Then also the plaintiff talks about public
9 accommodation and the plaintiff says, well, to the extent
10 there isn't any joint employer relationship here, then there's
11 a public accommodation case. But again, that's not true, and
12 here's why.

13 The plaintiff refers to the Haynes case, and that's
14 where there was a physician who had privileges at a hospital
15 and the hospital later took away those privileges. And the
16 difference is here the hospitals didn't take anything away
17 from Dr. Loewen. GRMEP dismissed Dr. Loewen from the program,
18 not the hospitals. There's no -- it's not as though there's
19 some sort of premises liability that because she was using the
20 hospitals' facilities to complete her residency program, that
21 all of a sudden the fact that they might have this public
22 hospital that's accessible to the public, that all of a sudden
23 there's a public accommodations claim. It's just not so.

24 Now, if the Court is fine with me doing so, I'd like
25 to talk about the Title IX claims a little bit.

1 THE COURT: Go ahead.

2 MS. LACHMAN: So under Title IX the hospitals are
3 not educational institutions. They don't have as their
4 primary purpose or even any kind of central purpose whatsoever
5 to be an educational institution. That's not a hospital like
6 U of M's hospital or anything like that. It's not a teaching
7 hospital. I'm talking about Spectrum and Trinity, and these
8 are hospitals and their primary purpose is to treat patients.
9 The fact that they allow residents to use their facilities
10 through this residency program doesn't make them a teaching
11 hospital. It doesn't make them an educational institution by
12 any stretch.

13 And the plaintiff, you know, first off, she doesn't
14 sufficiently allege that they're educational institutions.
15 But still, it doesn't help to grant leave to amend here
16 because there just aren't any features she could point to to
17 say that this is an educational institution.

18 For example, the hospitals, they don't evaluate.
19 They don't provide the instructors. They don't provide the
20 course training. They're not involved in the day-to-day
21 management of the residency programs. They don't grade. They
22 don't provide certifications. The residency program is simply
23 ancillary to the hospitals' purpose.

24 And the plaintiff cites or makes the argument that
25 because the hospital receives federal funds, it is therefore

1 an educational institution. But that can't be so because lots
2 of places receive federal funds. I think MDOT probably
3 receives federal funds for roads. That doesn't make them an
4 educational institution. Those are two separate inquiries.
5 So the fact that the hospitals may receive federal funds does
6 not bring them within the purview of Title IX.

7 Even so, even so, a Title IX claim would necessarily
8 fail because under Title IX, Title IX is not used as
9 frequently, and one of the key reasons, I'm sure, is that the
10 legislature really narrowed its purpose and they decided they
11 were not going to impose liability based on agency principles.
12 Because of that, they've required this deliberate indifference
13 standard. The hospitals would have actually had to have known
14 of discriminatory treatment and had the opportunity to correct
15 it and then been deliberately indifferent to that harassment
16 or discrimination. The plaintiff doesn't allege it. She
17 can't allege it. The hospitals weren't involved. So any
18 which way, the Title IX claim fails.

19 Then I also want to mention in terms of there was no
20 adverse employment action by the hospitals. I referenced it
21 earlier, but I think it's important to stress it was not the
22 hospitals' decision to dismiss Dr. Loewen from the program.

23 I anticipate that the plaintiff will say there was a
24 special or surgical education board or there were teachers
25 that had a relationship with the hospital that somehow had

1 some influence. First, the people that the plaintiff has
2 identified, those aren't employees of the hospitals. They are
3 people who have privileges at the hospitals and they're able
4 to use the hospital the way that many surgeons around town use
5 them. That's just a misstatement in the plaintiff's response
6 brief, and we filed affidavits in support of that.

7 But in addition, even if any were employees or had
8 independent contractor relationships or had any affiliation
9 whatsoever, the work that they're doing at GRMEP as
10 instructors or anything of the sort, they're not doing in
11 their role as a hospital agent. For example, many doctors who
12 work at the hospitals, they have their own independent private
13 practices, and when they're working in their private
14 practices, they're not doing so on behalf of the hospital. So
15 if they are working as teachers, if they're moonlighting over
16 at GRMEP as teachers, well, that's not anything they're doing
17 on behalf of the hospital.

18 And then lastly, I just want to address the unjust
19 enrichment claim. That fails because there's already a
20 contract on this subject matter. That's why I understand
21 plaintiff was willing to dismiss it as to GRMEP.

22 The plaintiff here contends against the hospitals
23 that it survives because the hospital was not a party to the
24 contract. That's true, but it doesn't change the analysis,
25 because the hospitals were effectively contemplated in that

1 contract. The contract between Dr. Loewen, it gives her a
2 grant for the work that she's doing in the residency program.
3 I believe it was \$40,000, and it says that the compensation --
4 all compensation in any form is for her furthering her
5 educational studies, and it expressly says it is not for
6 patient care services.

7 And beyond that it says, this is a quote: "No
8 compensation of any kind or nature shall be paid to or
9 accepted by resident from patients or third parties," like the
10 hospitals, "for any services rendered." So she has waived any
11 claim that she could have had against the hospitals for
12 compensation, and the hospitals should be allowed to rely on
13 that contract for protection against an unjust enrichment
14 claim. She already negotiated the terms of her residency and
15 she shouldn't be able to look for more later.

16 THE COURT: Thank you, Ms. Lachman.

17 Okay. Mr. Bretz, go ahead.

18 MR. BRETZ: Good morning, Your Honor.

19 Ms. Lachman covered virtually all the points that I
20 need to cover in our joint brief. As you know, I represent
21 Trinity Health and its facility, Saint Mary's Health Care, and
22 I just want to perhaps emphasize some of the points in
23 particular with regard to my client.

24 The Court's well aware of 12(b)(6) pleading
25 requirements. They can't be conclusory. There must be some

1 factual support for the allegation, and there are zero facts
2 alleged in the complaint, and the complaint is quite lengthy,
3 zero facts alleging that Saint Mary's Health Care controlled
4 any term or condition of the plaintiff's employment, that they
5 set any standards for her to achieve, that they took any
6 employment action with respect to her, or that they're even an
7 educational facility. No facts.

8 The sole activity that the plaintiff alleges
9 occurred at Saint Mary's is in Paragraph 31 of the complaint
10 where she says some unnamed nurses at Saint Mary's undermined
11 the authority of female surgical residents. That's it. And
12 there is nothing in the complaint to support the totally
13 conclusory allegation that Saint Mary's Health Care and
14 Spectrum are considered employers. To the contrary, they are
15 not. There is no factual improvement that's available in this
16 complaint to make them the plaintiff's employers, and that's
17 what we've shown.

18 This complaint is defective on its face. GRMEP is a
19 Michigan nonprofit corporation. GRMEP has conceded it was
20 plaintiff's employer. All of the adverse actions alleged in
21 the complaint were taken by GRMEP. Paragraph 79, Plaintiff
22 had a contract with GRMEP. Paragraph 80, the contract was
23 terminated by GRMEP. Paragraph 81, GRMEP did not provide
24 notice. 84, GRMEP did not pay her stipended benefits.
25 Paragraph 85, GRMEP breached the contract. There are no

1 allegations even remotely like that against Trinity Health,
2 Saint Mary's, or Spectrum.

3 Plaintiff's reply brief cites to certain stray
4 facts, I'll characterize them as that, that an employee of
5 Saint Mary's once served on GRMEP's board. Ms. Lachman has
6 cited the case. The fact that an employee of one entity
7 serves on a nonprofit board does not make the primary entity
8 an employer in that case. I can sit on the board of the YMCA.
9 That doesn't make my law firm an employer for purposes of YMCA
10 employees, and there's no law to support that assertion.

11 Plaintiff also cites in her response that she has
12 access to the hospital facilities and that the hospital could
13 bar her from access. Well, that's the same as any visitor,
14 any vendor, any patient for that matter who accesses the
15 hospital's facilities.

16 The plaintiff alleges she got a DEA number from the
17 hospital so she could write scripts. That doesn't make her an
18 employee. That makes her a physician at best with some
19 privileges.

20 Then the plaintiff points to this list of program
21 leadership, all the doctors who serve as instructors or
22 program directors at GRMEP. We've submitted a declaration,
23 even if plaintiff could improve her pleading, to say none of
24 these are employees of Trinity Health or Saint Mary's Health
25 Care. They're in fact independent contractors. They're

1 physicians with privileges, some at Saint Mary's, some at
2 Spectrum. They are by definition independent. We don't
3 control them. So the fact that they may serve as instructors
4 or program directors at GRMEP is not binding on an entity that
5 they have a separate independent contract with, nor does it
6 flow liability through to that contracting entity.

7 So those allegations are insufficient. The
8 complaint cannot be perfected or improved, and the 12(b)(6)
9 dismissal is appropriate.

10 THE COURT: Thank you.

11 Ms. Kelley for MSU?

12 MS. KELLEY: Good morning, Your Honor.

13 Again, many of the same arguments apply to the
14 university as well. Plaintiff sues MSU for discrimination and
15 retaliation under Title IX, Title VII, the ADEA, and
16 Elliott-Larsen Civil Rights Act. The university as a state
17 institution is immune from liability under the ADEA.

18 And just to be clear about MSU in this setting, Your
19 Honor, this is not one of MSU's residency programs. We have a
20 medical school. We do operate some residency programs, but
21 this just isn't one of them. This is a residency program
22 operated by GRMEP, and MSU's role in the relationship here is
23 defined by the parties' Operating Agreement. And what that
24 Operating Agreement says is that MSU shall serve as the
25 affiliated institution for the residency program, and the

1 parties have said what this means. What this means is that
2 the educational departments of GRMEP shall work cooperatively
3 with the educational departments of the university in
4 implementing educational and training programs that GRMEP
5 operates and manages. So we're to work cooperatively with
6 GRMEP in developing training programs, education programs. So
7 that's what MSU's role is here.

8 MSU, again to reiterate, MSU didn't pay the
9 plaintiff. It wasn't plaintiff's employer. It didn't provide
10 her with benefits. It was not involved in any way in her
11 selection for the residency program or her dismissal from the
12 residency program. The Operating Agreement and the evidence
13 shows that these responsibilities were placed squarely on
14 GRMEP.

15 Under both federal and state discrimination laws,
16 you have to show if you're going to be liable, held liable as
17 an employer that you control the terms and conditions of the
18 plaintiff's employment, that you control the means and manner
19 of plaintiff's work. That just didn't happen here with
20 respect to MSU. I mean, it's just -- it's clear that GRMEP
21 controlled plaintiff's work, the scheduling, the selection,
22 the dismissal, the pay, the benefits.

23 With respect to the Title IX claim, Your Honor, MSU
24 clearly is an institution that is subject to Title IX. We
25 receive federal monies. But that doesn't mean we are subject

1 to liability here. First of all, MSU paid no money to GRMEP
2 for operation of this residency program. MSU paid some monies
3 to GRMEP for some operation of some programs that it ran for
4 MSU's medical students, but again, no money was paid to GRMEP
5 for operation of this residency program. No funding was ever
6 given to GRMEP.

7 Not only that, Your Honor, but under Title IX you
8 cannot use an agency theory to hold an institution liable.
9 You can't use a joint employer theory; you can't use an agency
10 theory to make MSU liable here. MSU has to be held liable
11 under Title IX for its own misconduct, its own alleged
12 deliberate indifference.

13 Here we don't even have any MSU employees that are
14 the alleged actors in this case. None of them are employed by
15 MSU, so there can be no misconduct by MSU under Title IX. So
16 there's simply no federal liability under Title IX here, Your
17 Honor, and unless the Court has questions, I'll save any
18 remaining time for rebuttal.

19 THE COURT: All right. Thank you.

20 Okay. Plaintiff's positions, Mr. Huber. Is it Mr.
21 Huber?

22 MR. LIEBER: Mr. Lieber.

23 THE COURT: Lieber?

24 MR. LIEBER: Yes. I believe Mr. Huber --

25 THE COURT: I'm sorry. I have a hard time hearing

1 now. Mr. Drew maybe can explain that to you. I had my
2 hearing injured in Guy Fawkes Night in 2008. So anyway, here
3 we are.

4 MR. LIEBER: Mr. Huber has -- he's my partner and he
5 has also entered his appearance.

6 Your Honor, Rule 56 under the United States Supreme
7 Court's trilogy of Anderson, Celotex, and Matsushita which
8 have been referred to in many of the parties' briefs as well
9 as in this circuit's case in Morris v. Morris indicate that
10 your purview here is the pleadings, depositions, answers to
11 interrogatories, and admissions on file. Well, we're at kind
12 of a disadvantage here. There's been no discovery. There's
13 been no -- there are no depositions. We don't have responsive
14 pleadings from most of the parties, only from GRMEP.

15 Now, as the non-moving party under that trilogy I
16 have the affirmative duty to direct the Court's attention to
17 those specific portions of the record as it exists upon which
18 we seek to create gen -- we seek to create genuine issues of
19 material fact. The main material fact at issue here is who is
20 the employer? Is there a joint employer for purposes of the
21 fair employment and civil rights laws? And we would suggest
22 to you that even in its preliminary posture, the record makes
23 clear that there are significant admissions on file.

24 Now, I'd like to just review --

25 THE COURT: Well, you have to start, it seems to me,

1 with the contract between GRMEP and the other programs. But
2 let me just read it to you: GRMEP shall serve as the sponsor
3 of the programs for the residents, the residency programs, and
4 shall employ the residents. GRMEP will have overall
5 responsibility for the recruitment, selection, employment, and
6 orientation of the residents, will supervise and evaluate the
7 overall performance of the residents, and develop and maintain
8 a curriculum for each program that meets the requirements for
9 the appropriate accreditation agencies. They also pay them.
10 They withhold income and Social Security taxes from payments
11 to residents.

12 If you read the cases, even the Sixth Circuit case
13 involving the Kentucky schools, it's almost like a
14 follow-the-money issue in order to determine whether someone
15 is an employer or an employee of a particular organization.
16 Go ahead.

17 MR. LIEBER: Your Honor, that would be -- first of
18 all, the follow-the-money issue is an issue upon which there
19 is some documentary concessionary material. As my opponent
20 for Michigan State recently referenced, yes, there is money
21 for GRMEP to educate rotating surgical undergraduate medical
22 students that go through this program here in Grand Rapids.
23 Well, my client, and we've presented evidence information to
24 this effect, part of her duties where she was actually a
25 clinical instructor also from Michigan State, a very frequent

1 duty for her was to educate those students. That was her job
2 as a resident.

3 So we think Michigan State does have at least one
4 palpable connection where money flowed, and there are
5 documents on file, including my client's appointment letter
6 and an evaluation, plus the operating documents which say yes,
7 GRMEP does allow Michigan State to control the selection,
8 placement, rotation, and education of those surgical medical
9 students who participate with the program. This is one of her
10 key duties as a joint employee. And, I mean, I can't tell you
11 the extent of it without more discovery, but it happens quite
12 frequently.

13 THE COURT: Well, if you're saying that you need
14 more discovery -- you made a number of assertions to come up
15 with an argument that there is a joint employment relationship
16 here. Do you need discovery to fill out those assertions?
17 I'm talking about Pages 5 and 6 of your response to Saint
18 Mary's and also your response to MSU at Page 9. Are you
19 saying that you need discovery to fill out those assertions?
20 What other types of assertions or proofs do you think you can
21 have to show that she was an employee of MSU, Spectrum, or
22 Saint Mary's?

23 MR. LIEBER: Well, I can run through the record,
24 Your Honor, to show where she -- there already is Twombly-type
25 evidence that suggests that she -- which is the test at this

1 point, that suggests that she is an employee, a joint
2 employee. What my opponents seem to be saying is that Dr.
3 Loewen has to show somehow that they are predominant employers
4 to be within the scope of Title VII's joint employment test,
5 which must be -- which should be construed liberally.

6 But if I could, Your Honor, I'd like to run through
7 some of those tests that show not only that she is a joint
8 employee, that dual employment relations already exist, and
9 indeed in the record even before you there are indicia of it.
10 Perhaps it could be fleshed out more in discovery, but already
11 we have a fair amount of it. They want to say -- they want to
12 minimize it, and their arguments, if you will, sir, go mainly
13 to the issue of weight of the evidence.

14 They will basically say that certain aspects of her
15 employment, and I think you've heard some of this in their
16 argument, well, that doesn't really mean anything because it's
17 in a hospital, or that doesn't mean anything because she had
18 access to the hospital; well, so does everybody else. Well,
19 that's not true. She had very extensive security-based access
20 to the hospital that everyone else didn't have. She had
21 access to regions of the hospital that everyone else didn't
22 have. She had access to the Internet, Intranet system of the
23 hospital on a controlled basis and the Internet in ways that
24 other people didn't.

25 There are so many control features here, if you

1 simply let me review them, I think that it's clear, it's
2 clear that Spectrum is in this case. There's no question
3 about Spectrum. Saint Mary's to a lesser extent may be in the
4 case, and that's an area I'm assuming and I think the Court
5 can assume that enhanced discovery would show that Saint
6 Mary's is on a par with Spectrum, and that's an area where I
7 think that discovery should be taken.

8 Now, in terms of --

9 THE COURT: Specifically what discovery are you
10 wanting here?

11 MR. LIEBER: All right. Well, what I'd like to do
12 with Your Honor is to show you the control features that we
13 know about with Spectrum, and then --

14 THE COURT: Don't you have those in your brief? I
15 thought those were in your response brief.

16 MR. LIEBER: Some of them were. But we sent another
17 document in which is actually --

18 THE COURT: Is that that 80-page one that I just
19 heard about walking out here?

20 MR. LIEBER: Yeah, that's right. You got a part of
21 it from the defendants, Your Honor, and I went through it, and
22 quite frankly there are a lot of control features in it which
23 again I'm willing to review with the Court. And I would like
24 to be able to make a record on these issues because I think it
25 would be an injustice at this juncture to simply dismiss the

1 case, especially against Spectrum and MSU, without allow --
2 without even allowing the opportunity to amend or add more
3 discovery. In fact, the control features are so great with
4 Spectrum particularly that we could conceivably in the
5 alternative plead a sole employer or integrated employer
6 theory as well as a joint employer theory. Now, I can point
7 those things out to you in the record, and I would like to.

8 THE COURT: Well, don't do it now. You know, I've
9 read the materials, and to go through the record at this point
10 in time I think would -- it's not fair to me, I mean, to start
11 getting into it because I went over it quite thoroughly,
12 frankly, the materials, the written materials that were
13 submitted, and I've got a list of the factors that you looked
14 at or mentioned and I've already mentioned them as part of the
15 record. That's why I asked the question. Do you need more
16 than that to support your assertion that these hospitals were
17 employers of the plaintiff?

18 MR. LIEBER: We would need more discovery, Your
19 Honor, if we need to prove that we have a triable case on that
20 issue. We would need to go into some of these control
21 features and find out what they mean and what the inferences
22 of them are.

23 THE COURT: Sir, we're not -- even now I think we're
24 past the motion to dismiss stage. We're into summary judgment
25 stage which has a different standard, of course, because the

1 parties are submitting documents outside that would be pure
2 complaint.

3 MR. LIEBER: Well, I think we are in the Rule 56
4 stage, Your Honor, and I don't think that there is a -- I
5 don't think there's an appropriate motion to dispose of these
6 cases on Rule 56. I think we should be permitted to take
7 discovery to show that the control features are not baseless,
8 to get into the relationship between Michigan State and GRMEP.
9 And if you look, for example, Judge --

10 THE COURT: How much time do you think you need to
11 do that?

12 MR. LIEBER: I don't know. Ninety days. But what
13 I'd like to do if I could during the same period, because some
14 of it will overlap, is to start taking -- I mean, the case is
15 live with GRMEP. There's no question.

16 THE COURT: Why do you want the other parties in?
17 That's just a matter of curiosity more -- and if you don't
18 want to answer it, you don't have to.

19 MR. LIEBER: Well, I can answer it. There are ways
20 that it's very important to us. I mean, the civil rights laws
21 contemplate reinstatement. First, for one thing, if we are
22 going to have an equitable remedy here, it appears --

23 THE COURT: I see. That's a good answer, yeah.

24 MR. LIEBER: All right. Okay. So that's very
25 important, and indeed one of the control features that's quite

1 important is that the hospitals have the right to approve of
2 the residents. They have the right to make the residents
3 leave and to discipline them, such discipline to be
4 implemented by GRMEP. If a resident doesn't satisfy the
5 hospital, either hospital, I believe this is Saint Mary's or
6 Spectrum, they can say, peremptorily without process, they can
7 say that the resident must leave, and that in fact is a
8 discharge.

9 THE COURT: All right. Listen, I'll tell you what
10 I'll do.

11 MR. LIEBER: All right.

12 THE COURT: I was prepared to make a decision today,
13 but hearing you and knowing that we're now receiving matters
14 outside of the record and you want to expand the record a bit,
15 I will grant -- I'll grant you your 90 days for discovery. I
16 will not stop discovery. I will set this motion aside. I'll
17 just put it on the administrative docket. That's just so the
18 Court of Appeals doesn't start writing me letters, why don't
19 you decide the motion, and we will give you 90 days of
20 discovery.

21 I think that, quite frankly, you have an uphill
22 battle. But, you know, I will look at everything that you
23 give me and we'll see where we are in 90 days. Someone write
24 a letter. Ninety days is fine with me because I'm going to be
25 in Europe in June and then I hope up north in July and August,

1 so that will come in just about the right time.

2 Someone should write me a letter telling me -- I'll
3 put this in an order -- telling me that we've had our
4 discovery now. I'm not going to limit you to discovery
5 regarding the employer-employee relationship and the notice
6 under Title IX, which I think is a difficult issue for you as
7 well. I'll just leave everything for discovery for this 90
8 days and then people can flesh out their briefs and then I'll
9 decide it.

10 MR. LIEBER: All right. Now, this does not
11 include the discovery on the main case against GRMEP? I'm
12 sure Your Honor has looked --

13 THE COURT: No, you can do that too, right.

14 MR. LIEBER: That's not limited to 90 days, though,
15 obviously?

16 THE COURT: No, no, right.

17 MR. LIEBER: All right. But we can -- we'll begin
18 with our Rule 26 disclosures, and I would assume -- is that
19 triggered now? Is this --

20 THE COURT: No. Do I have a joint status report in
21 yet, Phil? There's not been a Rule 16. All right.

22 MR. DREW: There have not been answers filed yet, so
23 it probably hasn't triggered a Rule 16 yet.

24 MR. LIEBER: Well, there has been an answer filed.

25 THE COURT: Well, I'll allow, even though answers

1 haven't been filed, I'll allow discovery of GRMEP.

2 MR. LIEBER: All right. And that -- but there's no
3 discovery cutoff at this point?

4 THE COURT: Not yet, but there soon will be. After
5 that 90 days there will be discovery cutoff.

6 MR. LIEBER: Fine.

7 THE COURT: Unless you want to submit a joint status
8 report and then the regular Rule 16, but usually we don't do
9 that until we -- Phil, why don't we do that, and I'll do it by
10 phone so you don't have to come all the way over here again
11 unless you want to. But we'll enter a joint status
12 requirement, a report. Then we'll handle a Rule 16. Mr. Drew
13 can tell you what that's all about, and we'll set then the
14 discovery cutoffs.

15 But I'll set an order now saying that the discovery
16 cutoff regarding the pending motions, the issues involved with
17 the pending motions will be 90 days from now.

18 MR. LIEBER: Thank you, Your Honor.

19 THE COURT: Okay. Yeah.

20 MR. BRETZ: May I, Your Honor?

21 THE COURT: Sure.

22 MR. BRETZ: The motions remain pending. Will these
23 defendants need to file an answer?

24 THE COURT: Well, good question. Does the filing of
25 an answer bother you a whole lot?

1 MR. BRETZ: Well --

2 THE COURT: In other words, I don't want any
3 unintended consequences here.

4 MR. BRETZ: Yeah. Being involved in a case where
5 he's searching for a cause of action bothers my client, but
6 put that aside. I would prefer to remain it as is. If the
7 Court's going to hold in abeyance its ruling on our motions,
8 I'd prefer to leave it that way.

9 MR. LIEBER: Well, as long as I can understand, Your
10 Honor, I don't have a problem with that, with not getting an
11 answer if this is really --

12 THE COURT: You know what he's going to say.

13 MR. LIEBER: If this is just simply on the motion,
14 but it does not preclude us, assuming that some of the causes
15 of actions remain, taking discovery on the merits after we see
16 who's still in the case and on what claims.

17 THE COURT: Listen, my attitude about that is even
18 if they're out of the case, you're entitled to discovery from
19 them regarding certain aspects of this case.

20 I'll enter an order. It will say there's discovery.
21 Discovery cutoff regarding the issues that are raised in this
22 motion which I will list will be 90 days from now. I will not
23 have a cutoff for the other times, and I will -- there will be
24 no restriction on what discovery you can take so long -- other
25 than what's under the rules, and I might even put in there a

1 disclosure of documents regarding any documents under Rule
2 26(a) and all of that.

3 Are there going to be expert witnesses?

4 MR. LIEBER: On this? I -- at this time I don't
5 contemplate any. I think it's a factual question, and that's
6 what --

7 THE COURT: Well, I mean as far as the motion, it
8 might be. But as far as, for example, you know, I would
9 assume, and I could be dead wrong about this, that there might
10 be expert opinions as to her qualifications --

11 MR. LIEBER: Yes.

12 THE COURT: -- as a resident and as a physician.

13 MR. LIEBER: I assume that there will be, on the
14 case-in-chief, that there will be experts on certain
15 professional issues and on economic issues.

16 THE COURT: All right. My order will also put in
17 deadlines for those types of things, but it will be further
18 out than the 90 days.

19 MR. LIEBER: All right, Your Honor. Thank you.

20 MR. BRETZ: One last question.

21 THE COURT: Yeah.

22 MR. BRETZ: The discovery requirements go both ways
23 during the 90 days?

24 THE COURT: Yes, yes. It will be wide-open
25 discovery. All right. That's what we'll do. Okay. Thanks,

1 counsel.

2 MR. LIEBER: Thank you, Your Honor.

3 MR. BRETZ: Thank you, Your Honor.

4 THE COURT: I'll sit here and do the order right
5 now. You can hang around and we'll, you know, negotiate it.

6 MR. LIEBER: Thank you, Your Honor.

7 MS. LACHMAN: Thank you, Your Honor.

8 (Proceedings concluded at 11:46 a.m.)

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CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier

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